SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 481.

DONALD T. LAPINSOHN and
CAROL LAPINSOHN, his wife,

Respondents,

v.

~~LEWIS CHARLES, INC.~~

~~and~~

FIRST CAMDEN NATIONAL BANK & TRUST CO.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

C. Clark Hodgson, Jr.,
John P. Hauch, Jr.,
Attorneys for Petitioner.

Of Counsel:
Stradley, Ronon, Stevens & Young,
1300 Girard Trust Building,
Philadelphia, Pennsylvania. 19102

Archer, Greiner, Hunter & Read,
518 Market Street,
Camden, New Jersey. 08101

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-5711 Area Code 215

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IN THE

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OCTOBER TERM, 1968

No.

DONALD T. LAPINSOHN AND
CAROL LAPINSOHN, HIS WIFE,
Respondents

v.

~~LEWIS CHARLES, INC.~~
~~and~~
FIRST CAMDEN NATIONAL BANK & TRUST CO.,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, First Camden National Bank and Trust Co., respectfully prays that a Writ of Certiorari issue to review the Order of the Superior Court of Pennsylvania which was entered on March 21, 1968.

OPINIONS BELOW.

The opinion of the Superior Court of Pennsylvania is reported at 212 Pa. Super. 185, 240 A. 2d 90 (1968); a copy of the said opinion is attached hereto as Appendix A. The opinion of the Court of Common Pleas of Philadelphia County is unreported; a copy is attached hereto as Appendix B.

JURISDICTION.

The Order of the Superior Court of Pennsylvania was entered on March 21, 1968. Petitioner's request for reargument, addressed to the Superior Court, was denied April 16, 1968. Petitioner thereafter petitioned the Supreme Court of Pennsylvania for allowance of an appeal from the Superior Court to the Supreme Court, which Petition was denied on June 10, 1968; a copy of the Supreme Court's Order is attached as Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3). The Order sought to be reviewed is final since, if the question of venue is postponed until the conclusion of the trial, the parties may be compelled to relitigate in another forum. *Mercantile National Bank v. Langdeau,* 371 U. S. 555 (1963).

QUESTION PRESENTED.

Whether a state "doing business" doctrine shall supplant a federal venue provision so as to permit proceedings against a national bank in a jurisdiction where it is "doing business" but which is not where the bank is "located" as required by the National Bank Act 12 U. S. C. § 94.

STATUTORY PROVISION INVOLVED.

The statutory provision which is involved in this case is 12 U. S. C. § 94 of the National Bank Act, which section is subtitled "Venue of Suits" and reads as follows:

> Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which each association may be established or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.

STATEMENT OF THE CASE.

Petitioner is a national banking association organized and existing under the laws of the United States and controlled by the Treasury Department (R. 25a). Under its Articles of Association, Petitioner is established in Camden, New Jersey where it maintains its principal office for conducting its business (R. 26a, 39a).

Petitioner operates a branch office in Pennsylvania at 223-225 Market Street, Philadelphia (R. 27a). The Philadelphia branch has been conducting business at that location through its predecessors as early as 1812, when it was known as the State Bank of Camden (R. 30a). On June 2, 1865, this branch became part of the National State Bank of Camden, Petitioner's immediate predecessor (R. 27a), and on May 16, 1928, Petitioner assumed control and operation of the banking business at that location (R. 27a). Petitioner employs six persons to service its customers and accounts at this branch (R. 43a).

Respondents are New Jersey residents (R. 7a). Lewis Charles, Inc. (Defendant in the lower court and only nominally a party to these proceedings) is a New Jersey corporation engaged in the business of building and selling homes in New Jersey (R. 7a).

On November 25, 1966, Respondents instituted a suit in Pennsylvania against Defendant for allegedly defective construction of a residence in New Jersey (R. 1a, 7a, 14a). The action was commenced by writ of foreign attachment pursuant to Rule 1252(3) [1] of the Pennsylvania Rules of Civil Procedure which provides that suit against a foreign corporation may be maintained in Pennsylvania if a garnishee holding property of the Defendant may be served in the county where the action is commenced.

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1. All Pennsylvania Rules of Civil Procedure pertinent to foreign attachment practice and which are applicable to this proceeding are set forth in Appendix D to this Petition.

On November 25, 1966, the Sheriff of Philadelphia County served Respondents' writ upon Petitioner's Philadelphia branch office by handing a copy of the attachment papers to an officer of Petitioner at the branch (R. 6a).[2]

On December 5, 1966, Petitioner filed preliminary objections to the writ of foreign attachment as is contemplated by Rule 1268 of the Pennsylvania Rules (Appendix D). Petitioner contested the validity of the attachment on the grounds that section 94 of the National Bank Act prohibited it from being a party to a proceeding in Philadelphia when its Articles of Association provided that the bank was located in Camden, New Jersey (R. 1a, 16a).

Rule 1254(a) (Appendix D) directs that the venue for an attachment may be laid either where ". . . (1) the property is located, or (2) a garnishee may be served." (Appendix D). The Sheriff's return on the writ reflected that the attachment was effected by personal service upon one of Petitioner's officers at the Philadelphia branch; no property of the Defendant was located or seized (R. 62). Since no property was found, Petitioner contended that it could not be served here or made a party to an attachment in Philadelphia consistent with section 94 of the Act, and requested the Court to quash Respondents' writ and dissolve the attachment against it (R. 16a, 17a).

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2. The Commonwealth Land Title Insurance Company (herein Commonwealth) was also named as a garnishee in this action and served with a writ of foreign attachment. On December 19, 1966, with the agreement of Respondents, the attachment proceedings were discontinued against Commonwealth (R. 1a). Commonwealth was retained in the caption of this case both by the Court of Common Pleas of Philadelphia County and by the Pennsylvania Superior Court, although it did not participate in the proceedings in either Court, nor does it have an interest in the outcome of this Petition. Counsel for Petitioner is, simultaneous with the filing of this petition, serving upon the Clerk of the Court the notice required by Rule 21(6).

Respondents answered Petitioner's objections contending either that Petitioner had consented to suit in this forum or, by conducting a banking business in Philadelphia, it had waived its right to claim the immunity to suit afforded by the Act (R. 19a). Thereafter, depositions of Petitioner's officers, Messrs. Rivers and Viner were taken on these issues (R. 23a to 61a). The depositions established that Defendant maintained a checking account with Petitioner having a balance of $9500.00 (R. 34a).

On May 29, 1967, the Court of Common Pleas of Philadelphia County by the Honorable Joseph E. Gold sustained Petitioner's preliminary objections and dissolved the writ of foreign attachment (R. 62a).

On June 9, 1967, Respondents appealed to the Superior Court of Pennsylvania. The Superior Court on March 21, 1967, by vote of three to two, filed its opinion and Order reversing Judge Gold's Order and reinstating Respondents' writ against Petitioner. The sole rationale offered by the Court in support of its decision was that Petitioner had waived its rights to be sued in Camden, New Jersey under section 94 by operating a branch office in Philadelphia.

On March 29, 1968, Petitioner filed a timely petition for reargument with the Superior Court which was denied on April 16, 1968. Under 17 *Pa. Stat. Ann.* § 190 (1963),[3] the allowance of an appeal from the Superior Court of Pennsylvania to the Supreme Court is discretionary. On May 6, 1968, Petitioner filed with the Supreme Court of Pennsylvania a Petition for Allowance of Appeal, which was denied on June 10, 1968 (Appendix C). This Petition follows.

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3. Petitioner has included the full text of this statute as Appendix E.

REASONS FOR GRANTING THE WRIT.

I. The Decision of the Pennsylvania Superior Court Conflicts With This Court's Directive in the *Langdeau* Case.

The Pennsylvania Superior Court in deciding that Petitioner is amenable to suit in Philadelphia, where it is doing business, rather than in Camden, New Jersey where it is located,[4] places itself in direct conflict with this Court's ruling in *Mercantile National Bank v. Langdeau*, 371 U. S. 555 (1963), reaffirmed *per curiam* in *Michigan National Bank v. Robertson*, 372 U. S. 591 (1963).

In *Langdeau*, the receiver of a Texas insurance company in liquidation brought an action against numerous defendants, including two national banks. The action was commenced in Travis County, whereas the defendant national banks were located in Dallas County, Texas. The banks pleaded their section 94 privilege and urged that venue could be laid only where they were located. Texas had a statute making venue in Travis County proper. The Supreme Court of Texas held that its statute superseded section 94 of the National Bank Act. In reversing, this Court was explicit in commanding respect from states which would alter the federal legislation:

> National Banks are quasi-public institutions and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress *and are*

4. Courts have repeatedly and uniformly held that a national bank is "located" or "established" within the meaning of the venue statute at the place specified in its organization certificate. Manufacturers National Bank v. Baach, 16 Fed. Cas. 671 (No. 9052) (C. C. S. D. N. Y. 1871); National Union Fire Insurance Co. v. Lippert Bros., Inc., 233 F. Supp. 650 (D. Neb. 1964).

> *not to be interfered with by state legislative or judicial action, except so far as the law making power of the government may permit, Langdeau* at 558-59, quoting from *Van Reed v. Peoples' National Bank,* 198 U. S. 554 (1905). (Emphasis supplied.)

The invulnerability of National Bank legislation to interference by the states was forcefully underscored by this Court last term in *First Agricultural National Bank v. State Tax Commission,* — U. S. — (1968) 36 U. S. Law Week 4686, June 17, 1968.

Nevertheless, the Pennsylvania Superior Court viewed its mission as creating a basis for avoiding, without totally ignoring, the federal venue statute. To do so, however, meant that *Langdeau* had to be ignored. In fact, there is neither a discussion nor even an attempt to distinguish that case in the body of the Court's opinion.[5]

In *Langdeau,* this Court reversed the Supreme Court of Texas for applying its own venue statute as a justification for denying the effectiveness of section 94. Here, the Superior Court preferred its venue provision (Rule 1264(a)(2)) holding that Petitioner could be served in Pennsylvania and therefore made a party to proceedings outside the place of its location. Presumably, to avoid the conflict criticized by this Court in *Langdeau,* the Superior Court saw the operation of a branch bank as manifesting Petitioner's intent to be found in Pennsylvania, upon which the doctrine of waiver could be predicated. Thus, there is no essential difference between the Texas Court's position in *Langdeau,* and Pennsylvania's stance in this case, except for the gloss of "doing business." Peti-

5. The Langdeau case is cited in the Court's opinion for the fundamental proposition that a national bank should not be sued in a district or county other than that in which it was originally chartered. (212 Pa. Super. at 187; 240 A. 2d at 92). The case is not mentioned again.

tioner submits that on this basis alone, the Pennsylvania Superior Court must be reversed in conformity with this Court's instructions in *Langdeau.*

Moreover, the factual basis for the Superior Court's holding that a waiver has occurred is tenuous at best. There has been a branch of a New Jersey national bank in Philadelphia since 1865 (R. 27a). Presumably, Congress was aware of Petitioner's multistate banking operations in 1875 when it passed the predecessor of the present venue statute. Thus, Petitioner cannot have waived a statute passed for its benefit, unless the Court is prepared to say that the waiver of the statute occurred at the instant the act was passed. Furthermore, the Court below holds that since Petitioner availed itself of the federally granted privilege of doing business in Pennsylvania, then it has manifested an intent to be found in Pennsylvania for suits arising out of business conducted here. (212 Pa. Super. at 193, 240 A. 2d at 94-95.) However, there is not one shred of evidence in the record which even remotely suggests the Petitioner's doing business gave rise to or had any connection with the underlying cause of action. Contrariwise, all the indications in the record point to the appropriateness of Camden County, New Jersey as the forum to litigate these claims since all parties reside there and the real estate which is the subject of the suit is situate there (Respondents' Complaint R. 7a to 11a).

As added justification for its decision, the Superior Court attempts to interpret section 94 in light of modern day banking practices which it sees as minimizing the need for a protective venue statute. (In so doing, it relies upon *Chaffee v. Glen Falls National Bank & Trust Co.*, 128 N. Y. S. 2d 539 (1953), disapproved by implication in *Langdeau, supra,* at 529, footnote 13.) Curiously, the Court sees this rendering of the statute as preserving "the

general policies of the National Bank Act" (212 Pa. Super. at 192-193, 240 A. 2d at 94) even though it holds that proceedings against Petitioner may be maintained at its branch bank. The difficulty with the Court's analysis is that it fails to recognize that a special venue statute is clearly intended as a departure from the usual rules permitting suit where a party can be found or, in the case of a corporation, where it is doing business. Therefore, the only policy of the federal statute is to permit suits at the place where the national bank is located, and not elsewhere. Moreover, Mr. Justice White in *Langdeau,* foreclosed this area of inquiry by declaring: "But, without indulging in conjecture as to the object of the exemptions in question, it is sufficient that it was granted by Congress." *Langdeau, supra,* at 559.

The Pennsylvania Superior Court ruling disguises in waiver language what is a judicial repeal of section 94 as it applies to Petitioner's branch in Philadelphia. No Court yet has assumed this power, especially in light of the unequivocal mandate of this Court:

> Unquestionably, Congress has authority to prescribe the manner and circumstances under which [national] banks could sue or be sued in the courts and it addressed itself to this matter in the [venue provision].
>
> Appellee, however, would have us hold that any State Court could entertain a suit against a national bank as long as state jurisdictional and venue requirements were otherwise satisfied. Such a ruling, of course, would render altogether meaningless a congressional enactment permitting suit to be brought in the bank's home county. This we are unwilling to do. *Langdeau, supra,* at 559-60.

II. The Decision of the Superior Court Widens the Breach Between State and Federal Decisions on Whether Section 94 Can Be Waived; the Court Shoud Resolve These Differences in Accordance With Its Previous Precedents.

The decision in the Court below fuels up the conflict between the state and federal judiciaries on the question of whether the immunity conferred by Section 94 can be waived by conduct alleged to be inconsistent with the assertion of the statute. A review of the more than one hundred opinions interpreting this section reveals a discernible and growing trend on the part of the states to resist the application of this section to national banks which are in some fashion "present" within their respective jurisdictions.[6] Regularly, the state courts are able to perceive some activity on the part of a national bank which is inconsistent with the retention of the venue privilege. Two such decisions, relied upon by the Court below, are *Okeechobee County v. Florida National Bank,* 112 Fla. 309, 150 So. 124 (1933) where a national bank was sued as a party to a trust agreement which it had entered in a foreign jurisdiction, as a result of which the Florida Court found a waiver of the bank's timely assertion of the privilege. *Lichtenfels v. North Carolina National Bank,* 260 N. C. 146, 132 S. E. 2d 360 (1963) saw the North Carolina Supreme Court prevent a national bank from transferring litigation in which it was involved as a testamentary trustee to the Court having jurisdiction over the place where it was established (212 Pa. Super. at 191, 240 A. 2d at 93, 94).

6. This Court has observed this dichotomy in the Langdeau case where it classified cases according to how section 94 was applied. The federal courts were uniform in enforcing the statute, whereas the state cases varied in the degree to which they made the statute effective.

More recently, *Schaefer Sons, Inc. v. Watson*, 272 N. Y. S. 2d 780 (1966) remanded a case to the trial court for determination of whether a national bank's activities in the forum county through a branch, manifested an intent to conduct business as a member of the business community in the forum. The clear import of the remand was that if the trial court found that the national bank was doing business, it would hold that a waiver occurred. Many other state courts have taken a similar approach.[7]

On the other hand, federal decisions have uniformly applied the venue statute when a national bank has raised it at the appropriate time. Since the *Langdeau* and the *Robertson* cases, federal courts have unfailingly rendered this statute fully effective, not only when confronted with conflicting state statutes, but in the face of contrary federal law. In *General Electric Credit Corp. v. James Talcott, Inc.*, 271 F. Supp. 699 (S. D. N. Y., 1966), the district court struggled to reconcile the venue provisions of the Securities Acts with the National Bank Act. There, the bank's executive offices and three branches were located in the Southern District of New York, whereas the bank's charter recited that it was established in the Eastern District of New York, making venue in that district proper. The venue provisions of the securities legislation (15 U. S. C. § 77v and 15 U. S. C. § 78aa) would lay venue where the national bank is found or is an inhabitant or transacts business. Certainly, the national bank in *Talcott* was transacting business in the same sense that Petitioner is doing business through its branch in the instant case. Nonetheless, the Court was impressed by the position taken

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7. See also, Continental National Bank v. Folsom, 78 Ga. 449, 3 S. E. 269 (1863); Lee v. Citizens National Bank, 13 Ohio Dec. Reprint 913 (1872); Solum v. Farmers & Merchants National Bank, 269 Minn. 431, 131 N. W. 2d 231 (1964) and cases collected at 1 ALR 2d 904 (1965).

by this Court in *Langdeau* and ruled that Section 94 was to be applied, placing revenue in the Eastern District.

Dealing more recently with the same conflict in venue statutes, the Second Circuit affirmed the *Talcott* approach stating:

> The Supreme Court has emphatically held that where Congress has dealt with a particular venue problem—here actions against national banks—broader language in a venue statute will not overcome this even though literally applicable. *Bruns, Nordeman & Co. v. American National Bank & Trust Company,* 394, F. 2d 300, 303 (2d Cir. 1968).

The dichotomy between the federal system, faithful to the mandate of the statute, and the state-created variations on a waiver theme, has resulted in an arbitrary and discriminatory application of the statute. Presently, the application of section 94 depends upon the Court in which a national bank finds itself named as a party. Petitioner urges this Court to terminate this conflict with a strong declaration requiring absolute fidelity to the National Bank Act and to this Court's previous mandates.

The Pennsylvania Court is powerless to deny the immunity granted to Petitioner by Congress in section 94. The Court has decided a federal question of substance by inventing a general "doing business" exception to the statute, a fabrication never contemplated by Congress and at odds with the thinking of this Court.

CONCLUSION.

For the reasons set forth above, we respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

C. CLARK HODGSON, JR.,
JOHN P. HAUCH, JR.,
Attorneys for Petitioner.

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Girard Trust Building
Philadelphia, Pennsylvania 19102
ARCHER, GREINER, HUNTER & READ
518 Market Street
Camden, New Jersey 08101

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